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September 8, 2006

Via electronic mail

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 700
Washington, D. C. 20006

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Office of Proceedings

SEP 11 2006

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Public Record



RE: Finance Docket No. 33388 (Sub-No. 100) – *Reply of CSX Corporation and CSX Transportation, Inc. to Petitioners' Motion to Compel Responses to Discovery Requests Involving Relevancy Objections*

Dear Secretary Williams:

Please find attached the Reply of CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") to Petitioner's Motion to Compel Responses to Discovery Requests Involving Relevancy Objections (the "Reply") in the above-captioned proceeding.

CSXT is efilng this document. However, CSX will also provide the Board with an original copy of the Reply, together with ten copies thereof via DHL overnight express mail.

Thank you for your assistance.

If you have any questions please call or email me.

Sincerely yours,

Steven C. Armbrust

Enclosures

cc: Parties of Record
(with enclosures)

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 100)

CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC.
TO PETITIONERS' MOTION TO COMPEL RESPONSES TO
DISCOVERY REQUESTS INVOLVING RELEVANCY OBJECTIONS

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Attorney for: CSX CORPORATION AND
CSX TRANSPORTATION, INC.

Dated: September 8, 2006

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REPLY OF CSX CORPORATION AND CSX TRANSPORTATION, INC.
TO PETITIONERS' MOTION TO COMPEL RESPONSES TO
DISCOVERY REQUESTS INVOLVING RELEVANCY OBJECTIONS

CSX Corporation (“*CSX Corp.*”) and CSX Transportation, Inc. (“*CSXT*” and, together with *CSX Corp.*, “*CSX*”) respond below to the petitioners Bridgewater Resources, Inc (“*BRI*”) and ECDC Environmental L.L.C. (“*ECDC*” and, together with *BRI*, the “*Petitioners*”) Motion To Compel Responses To Discovery Requests Involving Relevancy Objections, filed with the Surface Transportation Board (the “*Board*” or “*STB*”) on September 5, 2006 (the “*Motion*”). *Petitioners* revised the initial discovery requests that they submitted on January 30, 2006 in response to the decision of the *Board* served on July 31, 2006 (the “*July Decision*”). Unlike the initial discovery requests, which were not served on *CSX*, the revised discovery requests (the “*Discovery Requests*”) now ask *CSX* to provide information and various documents in connection with this proceeding.

Pursuant to an agreement with *Petitioners*, Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “*NS*”), and Conrail Inc. and Consolidated Rail Corporation (collectively, “*Conrail*” and, together with *NS* and *CSX*, the “*Respondents*”), and in

accordance with the *Board's* August 29, 2006 decision (the "*August Decision*"), *CSX* objected (the "*Subject Objections*") to certain of the *Discovery Requests* (the "*Subject Discovery Requests*") on the grounds that such discovery requests were (i) beyond the "limited discovery" allowed by the *Board* in the *July Decision* and/or (ii) otherwise irrelevant to any issue presented in this proceeding and not reasonably calculated to lead to the discovery of relevant evidence. In addition, *CSX* objected to all of the *Discovery Requests* (the "*General Relevancy Objection*" and, together with the *Subject Objections*, the "*Initial Objections*") to the extent such *Discovery Requests* relate to any date that is (x) prior to the date that *CSX* made its first offer to acquire *Conrail* in 1996 or (y) after the date that the Transaction Agreement (as defined in the *NS Motion* referred to below) was executed by the parties thereto, in each case as irrelevant to the subject matter of this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this proceeding.

In addition to the *Initial Objections*, *CSX* reserved its right to (i) collect additional information responsive to the *Subject Discovery Requests* and (ii) object to the *Discovery Requests* (including, without limitation, the *Subject Discovery Requests*) on any other ground within the time frame set forth in the *August Decision*. Accordingly, *CSX* reserves the right to object to any or all of the *Discovery Requests* on grounds other than the *Initial Objections* and reserves its right to collect additional information responsive to the *Subject Discovery Requests*.

BACKGROUND

On January 20, 2006, *Petitioners* filed a joint "Petition For Clarification Or In The Alternative For Supplemental Order—North Jersey Shared Assets Area" (the "*Petition*"), which, among other things, asked the *Board* to clarify the limits of the North Jersey Shared Assets Area

(“*NJSAA*”) near Port Reading, New Jersey as such limits relate to the location of *BRI*’s waste transfer facility.

NS filed a motion to dismiss the *Petition*, including a request for a protective order to quash discovery (collectively, the “*NS Motion*”), arguing, among other things, that the terms set forth in and the maps attached to (i) the Transaction Agreement and the North Jersey Shared Assets Agreement, by and among *NS*, *CSXT* and *Conrail* and (ii) the deed pursuant to which *Conrail* conveyed to Pennsylvania Lines, LLC (the “*Deed*” and, together with the Transaction Agreement and the North Jersey Shared Assets Agreements, the “*Subject Agreements*”) the Lehigh Line west of CP Port Reading Junction, conclusively demonstrate that *BRI*’s assertion that its facility is within the *NJSAA* is incorrect as a matter of law. Although the *Board* denied certain portions of *NS*’ motion to dismiss in the *July Decision*, it did note that “*NS* has presented strong evidence, based on the transaction agreement, to support its claim that the *BRI* facility is located outside the *NJSAA*.” (*July Decision* at 4.)

Accordingly, with respect to the *Petitioners*’ discovery requests, the *Board* only provided that *BRI* could request “limited discovery for *BRI* to obtain evidence to further develop the record as to what the parties intended in their original transaction agreement.” (*Id.* at 4.) Specifically, the *Board* allowed “for limited discovery pertaining to the parties’ intent in defining the *NJSAA* boundaries in the original transaction agreement . . . [and was] . . . particularly interested in what the parties meant by the use of the term ‘CP,’ or control point, in defining the *SAAs*.” (*July Decision* at 5.)

ARGUMENT

THE BOARD SHOULD DENY PETITIONERS' MOTION TO COMPEL

As discussed in the Background section above, a determination of the merits of the *Petitioners'* claims should be based on the *Subject Agreements*, which are clear and unambiguous with respect to the parties' intent regarding the limits of the *NJSAA*. Therefore, to the extent the *Petitioners* seek information or documents that appear to be outside the scope of the *Subject Agreements*, *CSX* has properly objected to them as irrelevant.

Although *CSX* reserves the right to object to any or all of the Discovery Requests on the grounds of, among other things, being unduly burdensome and/or seeking to discover documents and information that are in the public record, with respect to Interrogatory Numbers 3, 4 and 7, and Document Request Number 2, *CSX* also maintains its relevancy-based objections for the reasons set forth below.

I. INTERROGATORY NUMBERS THREE AND FOUR RELATE TO THE "READING CONNECTOR", WHICH IS TRACK THAT HAS NOT EXISTED FOR OVER 20 YEARS

Interrogatory Number 3¹ seeks information regarding the "status and disposition" of the Reading Connector (including its status and disposition under the Final System Plan, details about applications for abandonment or discontinuance authority and details about its sale or lease), which is "a former [one mile] Conrail line . . . which was abandoned in approximately 1985 . . .". *Petitioners* have not justified their request for the information sought in Interrogatory Number 3 as helping to develop "the parties' intent in defining the *NJSAA* boundaries in the original transaction agreement." Because the Reading Connector did not exist when the

¹ See Appendix A, attached hereto, for the full text of Interrogatory Numbers 3 and 4 and Document Request Number 2.

Transaction Agreement defined the boundaries of the *NJSAA*, its history and status are irrelevant to *Respondents*' "intent in defining the *NJSAA* boundaries in the original transaction agreement". Therefore, *CSX*'s relevance objection is appropriate with respect to Interrogatory Number 3.

Interrogatory Number 4 poses a hypothetical question, which essentially asks the *Respondents* where the Reading Connector **would be** located within the CP at Port Reading Jct. or otherwise located within the *NJSAA* **if** it were reconstructed and restored to service, either by order of the *STB* or otherwise. This hypothetical question is irrelevant because it cannot be answered with any degree of certainty without a virtually unlimited range of speculation by *CSX*. Although the *Motion* responded to this objection by clarifying that *Petitioners* want *Respondents* to assume that the Reading Connector remained in its original location, *Respondents* would still be required to speculate on what the final terms of the *Subject Agreements* would be if the Reading Connector existed. The hypothetical location of the Reading connection does not delve into "the parties' intent in defining the *NJSAA* boundaries in the original transaction agreement." Importantly, the Reading Connector does not exist making speculative hypothesizing about its non-existent location by *CSX* irrelevant. Accordingly, under any interpretation, Interrogatory Number 4 is irrelevant and *CSX*'s objection thereto based on relevancy should be sustained.

II. INTERROGATORY NUMBER 7 AND DOCUMENT REQUEST NUMBER 2 RELATE TO A LINE THAT CANNOT SERVE *BRF*'S FACILITY

With respect to Interrogatory Number 7 and the related Document Request Number 2, the New Jersey Transit's Raritan Valley Line (the "*Raritan Line*") runs in an east-west direction north of Port Reading and *BRF*'s facility. Although *Conrail* and *NS* have freight operating rights over different parts of that line, no parts of that line connect with, or can be used to serve, *BRF*'s facility. The location of the *Conrail* and *NS* freight operating rights on *Raritan Line* do not lead

to “the parties’ intent in defining the *NJSAA* boundaries in the original transaction agreement.”

Therefore, *Petitioners’* informational and document requests with respect to this line are irrelevant and *CSX’s* objection thereto based on relevancy should be sustained.

III. THE GENERAL OBJECTION IS APPROPRIATE BECAUSE THE INTENT OF THE PARTIES WITH RESPECT TO THE SUBJECT AGREEMENTS IS THE ONLY RELEVANT CONSIDERATION

CSX objects to any informational requests that relate to any date that is (i) prior to the date that *CSX* made its first offer to acquire *Conrail* in 1996 or (ii) after the date that the Transaction Agreement was executed by the parties thereto, in each case as irrelevant to the subject matter of this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this proceeding. *CSX’s* position is consistent with the *July Decision*, which limited discovery to “the parties’ intent in defining the *NJSAA* boundaries in the original transaction agreement.” The Transaction Agreement was negotiated between the time *CSX* made its first offer for *Conrail* in 1996 and the date it was executed by the parties. The intent of the Transaction Agreement was developed during the time it was being negotiated, neither before nor after. The *Subject Agreements* speak for themselves and anything that occurred outside of the above referenced time period is not be relevant to the interpretation thereof.

CONCLUSION

CSX respectfully submits that the *Board* deny the *Motion* in all respects.

Respectfully submitted,



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Attorney for: CSX CORPORATION AND
CSX TRANSPORTATION, INC.

Dated: September 8, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2006 I served copies of the foregoing Reply of CSX Corporation and CSX Transportation, Inc. to Petitioners' Motion to Compel Responses to Discovery Requests Involving Relevancy Objections upon counsel for the other Parties of Record by electronic mail and overnight DHL express mail.

A handwritten signature in black ink, appearing to read 'S. Armbrust', written over a horizontal line.

Steven C. Armbrust

Appendix A

SUBJECT DISCOVERY REQUESTS

I. INTERROGATORIES

Interrogatory No. 3. Please describe the present status and disposition of the Reading Connector, including but not limited to:

- a. The status and/or disposition of the line under the Final System Plan.
- b. Whether authority was sought and obtained from the ICC, STB or other governmental authority to abandon or discontinue service on the Reading Connector or any part thereof; and if so, the docket number, the date when the abandonment or discontinuance authority became final, and the date when the abandonment or discontinuance authority was exercised.
- c. Whether the Reading Connector or any part thereof (including the underlying right-of-way) was sold or leased to another person(s), and if so, the date of the sale or lease, the name of the person(s) to which the property was sold or leased, and the specific property sold or leased.

Interrogatory No. 4. If the portion of the Reading Connector that crossed the Lehigh Line at grade in the vicinity of Port Reading Jct. were reconstructed/restored to service, either by order of the STB or otherwise, please describe the extent to which the restored Reading Connector would be located within the CP at Port Reading Jct. or otherwise located within the NJSAA.

Interrogatory No. 7. Please identify the point(s) on NJ Transit's Raritan Valley Line west of Bound Brook, NJ where (a) Conrail's property ownership interest(s) end and (b) west of which NS alone presently provides switching service to and from shipping and receiving facilities.

II. DOCUMENT PRODUCTION REQUESTS

Document Request No. 2. Please produce all documents defining the boundaries of the NJSAA in the vicinity of Port Reading Junction/Manville, NJ, including but not limited to the following (note: if a document was included in the Application in Finance Docket No. 33388 you may identify the location of the document in the Application rather than producing a separate copy thereof):

- a. color-coded maps or schematics showing railroad lines in New Jersey north of Trenton prepared and/or used by CSX, NS and/or Conrail in connection with CSX's and NS's agreement to divide the assets of Conrail and establish the NJSAA;

b. maps, schematics or other documents identifying the specific cut points establishing the limits of the NJSAA in the vicinity of Port Reading Junction/Manville, NJ;

c. maps, schematics or other documents identifying (1) the rail lines in the vicinity of Port Reading Jct./Manville/Bound Brook Jct., NJ but located outside the limits of the NJSAA that are subject to any form of trackage or operating rights, and (2) which carrier(s) have such rights over which specific lines;

d. maps, schematics or other documents identifying customer rail shipping and receiving facilities located within the NJSAA in the vicinity of Bound Brook, Bound Brook Junction, Port Reading Junction and Manville, NJ; and

e. maps, schematics or other documents identifying which rail carrier(s) would have and/or have had the ability to physically serve each customer rail shipping and receiving facility identified in response to (d) above (including without limitation the BRI facility) after the Split Date.